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SUPREME COURT, U.S.

No. 98-367

In The

Supreme Court of the United States

October Term, 1998

ROBERT D. HANNIGAN, WARDEN, *et al.*,

Petitioners,

v.

RAYMOND F. STANSBURY,

Respondent.

CHARLES SIMMONS, SECRETARY OF CORRECTIONS, *et al.*,

Petitioners,

v.

MICHAEL A. BANKES,

Respondent.

On Petition For Writs Of Certiorari To The Supreme Court Of The State Of Kansas

PETITIONERS' REPLY

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REASONS FOR GRANTING THE WRIT

I. Whether Ministerial State Prison Regulations Are "Laws" For *Ex Post Facto* Purposes Is An Unsettled And Important Issue Of Federal Law

With respect to the issue of when prison regulations may constitute "Laws" for constitutional *ex post facto* purposes, petitioners incorporate by reference and rely principally upon the discussion of that issue in the reply brief in *McKune, et al. v. Steltzlen*, No. 98-366, a related case. As respondent's opposition brief (hereinafter "Opp.") in this case makes doubly clear, the relevant *statutes* governing parole and conditional release have not changed since he committed his crime. Opp. 1-2. Instead, he complains that the *regulations* have been changed, Opp. 2-9, as petitioners have always acknowledged. That, however, is the initial issue in this case – whether the regulatory changes that affect respondent constitute "Laws" for federal *ex post facto* purposes.

A. Kansas Prison Regulations Adopt The View That Changes In Parole Eligibility And Conditional Release Regulations Are Not "Laws" For *Ex Post Facto* Purposes

Importantly, respondent's reliance on K.A.R. § 44-6-107, *see* Opp. 2-3, confirms petitioners' position that not all prison regulations are "Laws" for *ex post facto* purposes. Instead, as the portions of the regulation respondent quotes at length make clear, the prison regulations themselves clearly state that the "*statutes* constituting the substantive law in effect at the time the crime is committed shall apply to compute the sentence term and

the release dates." Opp. 3 (quoting K.A.R. § 44-6-107(a), which respondent acknowledges has been in effect continuously since 1984) (emphasis added). To the extent that fair notice is a purpose of the *ex post facto* prohibition, respondent had clear notice that he had no right to rely upon nor expect no change in the regulations affecting matters of parole and conditional release, only the *statutes*.

Respondent's repeated assertion that this regulation compels prison officials to use the parole and conditional release regulations in effect at the time an inmate committed his crimes, *see, e.g.*, Opp. 3, 17, 19, is simply incorrect. The regulation could not be more clear that prison officials are only obliged to follow "statutes" in effect at the time of the inmate's crime. All of K.A.R. § 44-6-107(a) speaks in terms of adherence to the relevant "statutes", with not a mention of similar adherence to "regulations" in effect at the time of the crime.

Under this regulation, Kansas prison officials have – since at least 1984 – taken the position that department of corrections *regulations* affecting parole and conditional release dates are interpretive regulations, not legislative regulations. In petitioners' view, if that position is correct, then the regulations are not subject to *ex post facto* constraints. The question for this Court, and on which the lower federal and state courts are divided, is whether that position is correct as a matter of federal constitutional law.

Although respondent works zealously to explain away all cases the petitioners cited in their petition, Opp. 21-28, the often minute factual distinctions he attempts to

draw, as well as his own concessions, further support petitioners' assertion that a real and important split exists. *See, e.g.*, Opp. 24 (offering "respondent's sincere belief that [*In re*] *Ramirez* [705 P.2d 897 (Cal. 1985)] was wrongfully decided – in fact, the case features an outstanding dissenting opinion to that effect").

B. Respondent, Like The Kansas Supreme Court, Ignores The Remedial Purposes Of The Regulations

Respondent, like the Kansas Supreme Court, focuses solely on the "effects" aspect of *ex post facto* analysis and ignores all other considerations. Thus, respondent ignores remedial purposes of the regulatory changes regarding the Sexual Abuse Treatment Program. For the reasons explained in the petition for a writ of certiorari at pages 28-29, an exclusive focus on disadvantageous effects is incorrect. Moreover, as the Ohio amicus brief points out, the Kansas Supreme Court's focus on "effects" alone runs counter to this Court's strongly declared deference to the judgments of prison administrators. *See, e.g., Washington v. Harper*, 494 U.S. 210, 223-24 (1990); *Turner v. Safley*, 482 U.S. 78 (1987); *see also Sandin v. Conner*, 515 U.S. 472, 482 (1995) (discussing need to avoid discouraging the "desirable development" of prison regulations and procedures); *Prater v. United States Parole Commission*, 802 F.2d 948, 954 (7th Cir. 1986) (en banc) (warning that applying the *ex post facto* prohibition to interpretive regulations will "discourage the formulation and publication of administrative policies"). These issues are of great importance to the States, with their ever-increasing prison populations. *See* Brief *Amici Curiae* of Ohio, *et al.* in

Nos. 98-366, 98-367 (36 states supporting request for review of these important *ex post facto* issues).

II. Respondent's Equal Protection, Fifth Amendment Self-Incrimination, And Due Process Claims Are Not Before The Court

Respondent devotes the final twelve pages of his opposition to several constitutional arguments that he either has not properly preserved or presented in this Court. *See* Opp. 28-39. His equal protection claim was not discussed or decided by the Kansas Supreme Court. *See* Pet. App. 1a-26a. Nor did the Kansas Supreme Court address a Fifth Amendment self-incrimination claim in respondent's case, although it did address and reject such a claim in the companion case, *Bankes v. Simmons, et al.* *See* Pet. App. 27a-45a.[1]

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[1] This Court several years ago granted a writ of *certiorari* to decide the self-incrimination issue in this context in *Montana v. Imlay*, 813 P2d 979 (Mont. 1991), *cert. granted*, 503 U.S. 905 (1992), *cert. dismissed*, 506 U.S. 5 (1992). Apparently because of a mootness problem in that case, however, the Court did not reach the merits of the claim, leaving it open. In Kansas, the Sexual Abuse Treatment Program, with its requirement of an acceptance of responsibility for the crime as a condition of participation has been both upheld against Fifth Amendment challenge, *Kirkpatrick v. Simmons, et al.*, No. 96-3140-MLB (D. Kan. July 24, 1998), and declared unconstitutional. *Lile v. McKune, et al.*, 1998 WL 689824 (D. Kan. Sept. 16, 1998). Petitioners would be willing to brief and argue the Fifth Amendment issue on the merits in this Court upon an order from the Court to do so. But none of the respondents have raised the issue in either a timely petition for a writ of *certiorari* or a conditional cross-petition.

Finally, the Kansas Supreme Court addressed and rejected a procedural due process claim in respondent's appeal, although not the one respondent appears to be raising in this Court. *See* Pet. App. 21a-26a (discussing application of the Internal Management Procedures and Policies ("IMPP") program to respondent following his refusal to participate in the Sexual Abuse Treatment Program; respondent never mentions the IMPP in his opposition brief in this Court). Moreover, any procedural due process claim here is foreclosed on the merits by this Court's decision in *Sandin v. Conner*, 515 U.S. 472 (1995), as the Kansas Supreme Court concluded. Pet. App. 25a-26a. Respondent, however, neither cites nor mentions *Sandin* and, instead, relies upon the very line of liberty interest cases the Court disavowed in *Sandin*. *See* Opp. 28-29.

In any event, respondent has not filed a conditional cross-petition, as he would have to do in order to properly present these independent claims to the Court at this time. Sup. Ct. R. 13.1, 13.4.

CONCLUSION

For the foregoing reasons, the reasons stated in the petition and the reasons set forth in the amicus brief filed by Ohio on behalf of 36 states supporting review of these issues, petitioners respectfully request that this Court grant the petition for a writ of *certiorari* in order to

resolve the splits of authority in the lower federal and state courts.

Respectfully submitted,

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